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Regional, Subregional Or Resident Office: Region 28, Phoenix, Arizona
Case Name: National Dance Institute - New Mexico, Inc.
Case Number: 28-CA-157050
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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

NATIONAL DANCE INSTITUTE – NEW MEXICO, INC.

and

Case 28-CA-157050

DIANA M. OROZCO-GARRETT, an Individual

RESPONDENT'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

National Dance Institute - New Mexico, Inc. (“NDI-NM”) submits this Post-Hearing Brief in further support of its position presented at the hearing held in the above-captioned matter on December 2 through 5, 2015. NDI-NM did not violate Section 8(a)(1) and (4) or any other provision of the National Labor Relations Act (the “Act”) as alleged by the Charging Party (the “CP”) in the October 9, 2015 Complaint and Notice of Hearing and the November 13, 2015 Amendment to Complaint (together the “Complaint”). The evidence at the hearing, as described in more detail below, demonstrates that:

- NDI-NM acted properly when it did not assign the CP to its Fall Program classes because NDI-NM had not yet completed investigations into complaints brought against the CP by an educational assistant of the Santa Fe Public Schools and by the CP’s co-worker;
- NDI-NM acted properly when it solicited a response from the CP to the complaints brought against her;
- NDI-NM acted properly when it terminated the CP’s employment after it completed its investigations and found that the CP violated NDI-NM policies, failed to comply with the terms of her probation, and failed to accept responsibility for her actions; and
- NDI-NM’s Employee Conduct Policy is consistent with the March 18, 2015 Report of the General Counsel Concerning Employer Rules and is not overly broad or discriminatory.

For these reasons, NDI-NM requests that the Administrative Law Judge dismiss the Complaint and all the allegations against NDI-NM contained therein.

II. FACTS

A. NDI-NM

1. NDI-NM’s Programs

NDI-NM is a nonprofit organization that has dance programs in the NDI-NM Dance Barns and in public schools throughout New Mexico. *Tr. 27:3-9*¹. The purpose of NDI-NM's programs is to help children develop self-discipline, a standard of excellence, and a belief in themselves that will carry into all aspects of their lives. *Tr. 203:19-204:4; Tr. 204:5-9*. NDI-NM's purpose is accomplished through a commitment to the "core four", which are: work hard, do your personal best, never give up, and choose a healthy lifestyle. *Tr. 41:14-17*. NDI-NM teaches children that teamwork, tenacity, discipline, and joyful effort can equal success, and that hard work and an uncompromising standard of excellence results in a genuine sense of achievement and self-respect that can change the life of any child. *Tr. 203:15-204:4*. NDI-NM instructors must participate in a two-week teaching excellence workshop before they are hired. *Tr. 201:23-202:7*. NDI-NM's core competencies are part of the artistic enrichment training that is conducted on an annual basis. *Tr. 201:14-22*.

NDI-NM has two main programs – the Outreach Program and the Dance Barns Program. The Outreach Program involves NDI-NM teachers actually going into the public schools in New Mexico and teaching children dance, choreography, and movement through a 30-week curriculum with specific guidelines and goals. *Tr. 28:4-7*. NDI-NM sends a team, consisting of a teacher and pianist, into a public elementary school once a week to teach classes that are 50 minutes long. The curriculum is divided into sections that are used throughout the year and allow teachers to get to know students and to teach using NDI-NM's teaching techniques and methodology. *Tr.30:22-31:5*. The NDI-NM team prepares students for an end-of-the-year performance as a part of the ultimate goal of the program. *Tr. 31:2-5*. It is critical to NDI-NM's

¹ Citations to the transcript indicate the page and line number(s) – page:line – so that "Tr. 27:3-9" refers to page 27, lines 3 through 9 of the transcript.

delivery of its mission that the teams work cooperatively with each other and the schools. *Tr. 200:7-201:6.*

The Outreach Program begins within the first month of the school year and typically ends in May after the end-of-the-year event. *Tr. 31:15-23.* The end-of-the-year event is for the public schools in Santa Fe and consists of performances that take place over a two week period – some schools perform during the first week, and some during the second week. *Tr. 33:7-14.* Approximately 500 students in grades three through nine participate, along with approximately 20 kindergartners. *Tr. 29:5-15.*

The Outreach Program includes the Residency Program, which consists of one, two, or three week long dance programs conducted around the state. *Tr. 27:17-28:1; Tr. 83:6-8.* The residency sites are generally in rural communities. *Tr. 27:15-17.* NDI-NM teachers take up “residency” in the community in which they are teaching.

The Dance Barn’s Program teaches children dance, choreography, and movement in after-school and summer classes held at NDI-NM’s Dance Barns. *Tr. 27:3-9.*

NDI-NM’s programs help fill a serious need for quality art and physical education programs that support lasting academic and personal development in children throughout the state. The students are mostly underserved children in elementary schools that have a high percentage of free breakfast and free lunch programs, which are indicators of families living in poverty. These schools generally do not have access to other programs or the funds to be able to provide additional programs to students. *Tr. 30:3-10; Tr.204:10-205:6.*

NDI-NM conducts wrap-up meetings with the schools it serves. *Tr. 230:24-231:14.* The purpose of these meetings is to evaluate its performance, make improvements and help create

excellence. *Tr. 231:2-14*. NDI-NM also holds its own annual staff meeting and other meetings throughout the year to remind its employees of their purpose and commitment. *Tr. 202:7-19*.

NDI-NM has been recognized with an award for its purpose and mission, and its Executive Director, Russell Baker was honored as Executive Director of the Year in 2015 by Albuquerque Business First. *Tr. 719:20-720:1*.

2. NDI-NM's Core Values and Beliefs

NDI-NM's core values are beliefs that guide all its behaviors and decisions. NDI-NM's core values are a belief in children, social responsibility, excellence, sustainability, and financial integrity. *Tr. 11:5-13*. NDI-NM teaches civility and respect, *Tr. 246:9-10; Tr. 669:20-21*, and all NDI-NM teachers are expected to exemplify the core values being taught to students, be role models for the communities they serve, *Tr. 199:23-200:6; Tr. 205:22-2*, and to teach by example, *Tr. 206:3-6; Tr. 669:24-670:8*. NDI-NM teachers are also expected to communicate in a manner that builds strong relationships with students and the schools, *Tr. 200:7-201:6*; to take responsibility for their own conduct, and to apologize when they behave badly. *Tr. 207:18-208:22; NDI-NM Exhibit C at 7*. These expectations are contained in the "Core Competencies of An Excellent NDI New Mexico Instructor" and in the Teaching Excellence Manual, both of which are given to all NDI-NM instructors and act as a guide for instruction. *Tr. 198:22-202:19; NDI-NM Exhibits B and C*.

NDI-NM's core values and its mission are set forth in NDI-NM's Employee Handbook, which is distributed to all its employees. *Tr. 212:5-11; Tr. 212:23-25*. NDI-NM emphasizes "appropriate use of touch" and "appropriate touch". *Tr. 206:7-207:9; NDI-NM Exhibit C at 5*, and NDI-NM employees are required to attend workshops regarding these subjects. *Tr. 207:10-*

17. NDI-NM employees also are taught about child safety, discipline, and the consequences of inappropriate touch. *Tr. 211:7-212:4; NDI-NM Exhibits D and E.*

Overall, the working environment at NDI-NM is one in which employees work hard but really enjoy what they do. It has a very positive atmosphere, and people are civil to one another and respectful of each other. *Tr. 668:14-23.*

B. The CP.

1. The CP's Employment at NDI-NM.

The CP was employed by NDI-NM as a part-time dance teacher for approximately 14 years. *Tr. 83:24-25.* The CP was provided an Employee Handbook and the Teaching Excellence Manual when she became an employee. *Tr. 198-22-199:8; Tr. 201:12-20.* The CP also attended workshops and training regarding the core values and beliefs. The CP was aware of the core values and competencies and that they applied to her as a part-time teacher at NDI-NM. *Tr. 609:12-23.* The CP also knew and understood the purpose of NDI-NM, including its standard of excellence, and that she was responsible for acting according to, and had to be a model of, NDI-NM principles. *Tr. 611:9-612:5.* The CP agreed with the following duties and responsibilities set forth in her job description: following NDI-NM's curriculum guide, belief in NDI-NM's mission, desire to strive for excellence, supportive teamwork, and behaving ethically and with personal integrity. *NDI-NM Exhibit TT; Tr. 611:14-23.* Remarkably, the CP was unable to recite any of the core values at the hearing, even after she heard two and one-half days of testimony that described those values. *Tr. 579:10-580:13.*

There were problems with the CP's work performance, which NDI-NM addressed with the CP, both verbally and in writing, about instances of improper behavior. On various

occasions, she had been rude or abusive to people. *Exhibit UU*. NDI-NM documented the CP's inappropriate behavior and examples of NDI-NM counselling her about her inappropriate conduct. Despite the written record, the CP claims not to remember such counselling. *Tr. 614:25-618:11; Tr. 619:24-620:1*. In any event, her improper behavior persisted.

2. The CP's Probation.

On September 10, 2014, the CP was placed on probation because the Principal of Sweeney Elementary School, where she taught, reported to NDI-NM that the CP "had been very rude and verbally abusive to her in front of her staff." *NDI-NM Exhibits H and EEE*. Additionally, "it was reported that [the CP] had done the same to teachers in front of their students." *NDI-NM Exhibit H*. The Principal told NDI-NM that this could "never happen again" and that she and her staff had "even talked about discontinuing the [NDI-NM] program because of these interactions." *Id.* These were serious accusations and having received these third-party complaints about the CP's conduct, and being advised of the potential withdrawal of an entire school because of the improper and unacceptable conduct of the CP, NDI-NM could not leave them unaddressed, but had to act. *Tr. 420:1-13; NDI-NM Exhibits NN, OO, PP, and EEE*.

Emily Lowman (NDI-NM's Santa Fe Outreach Director and the CP's direct supervisor) and Liz Salganek (NDI-NM's Artistic Director) met with the CP about the complaints brought by the Sweeney Principal and her staff. *Tr. 409:24-411:25*. The CP denied and simply dismissed any wrongdoing on her part and responded by complaining that the Sweeney teachers were "lousy", *Tr. 411:21-25*, refusing to accept constructive criticism about her work, and blaming others as the source of the problems and the complaints against her. *Tr. 411:13-15; NDI-NM Exhibit CC*. She became defensive and refused to acknowledge similar wrongdoing by her in the

past. *NDI-NM Exhibit CC*.

Ms. Lowman and Ms. Salganek placed the CP on probation and gave her a letter stating the terms of the probation: 1) the CP was being removed from teaching at Sweeney Elementary School; 2) the CP would continue to teach classes at another school and at the Dance Barns; 3) monthly check-in meetings to be scheduled with Ms. Lowman, as her supervisor, to evaluate the CP's work and support her efforts to maintain positive behavior and relationships during stressful times; and 4) if the CP repeated any of the improper behavior or if she ignored or violated any other policies, procedures, or direction from Ms. Lowman or senior management, the CP would be subject to disciplinary action, ranging from loss of additional classes up to termination. Rejecting the third party complaints against her, refusing to acknowledge any impropriety in her own behavior, and rejecting the efforts of NDI-NM to work cooperatively with the CP to correct her aberrant behavior, the CP refused to sign the probationary letter. *Tr. 613:5-6; 14-21; Exhibit H*.

3. The CP's Complaints to the NLRB, NDI-NM, the EEOC, and the HRB

The CP filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") on September 17, 2014, *GC Exhibit 34*, which she amended on November 25, 2014, *GC Exhibit 35*, and a formal charge of discrimination with the New Mexico Human Rights Bureau ("HRB") and the Equal Employment Opportunity Commission ("EEOC") on September 17, 2014. *Tr. 618:21-619:3; NDI-NM Exhibit VV*. The CP also filed an internal complaint or grievance with NDI-NM alleging discrimination. *See Tr. 621:10-18 and NDI-NM Exhibit FF*.

The CP's NLRB Charge resulted in a complaint and then an amended complaint issued

on March 10, 2015 (together the “March Complaint”). *GC Exhibit 36*. The March Complaint alleged, in part, that NDI-NM’s Standards of Professional Conduct policy was overly-broad and discriminatory and had prevented employees from discussing discipline. *GC Exhibit 36 at 4*. The March Complaint was settled by the NLRB, the CP, and NDI-NM in March, 2015. The settlement resolved all claims and allegations in the March Complaint. *Tr. 704:25-706:6; NDI-NM Exhibit FFF*. As part of the settlement, NDI-NM agreed to revise its Standards of Professional Conduct Policy and to delete language in the CP’s probationary letter that prohibited the CP from discussing her probation with others and to delete other language in the disciplinary letter that the NLRB believed could be construed as prohibiting protected activity. *Tr. 219:5-19; Tr. 220:3-12;16-221:16*. The revised conduct policy was approved by the NDI-NM Board and its Executive Committee, *Tr. 707:20-708:24*, and NDI-NM complied with all other provisions of the Settlement Agreement, including posting required notice. *See NDI-NM Exhibit G*.

With the NLRB’s approval of the settlement, the CP remained on probation, *Tr. 221:22-222:3*, and the CP knew she remained on probation. *Tr. 601:7-8*. NDI-NM revised the disciplinary letter pursuant to the Settlement Agreement, and again asked the CP to sign it. *NDI-NM Exhibit DD*. The CP refused to sign it. *NDI-NM Exhibit EE*. Ms. Salganek reminded the CP that the matter was settled and asked the CP, one more time, to sign the letter. *NDI-NM Exhibit FF*. Once again, the CP refused to sign it. *NDI-NM Exhibit H*.

Additionally, the NLRB-approved settlement agreement did not prohibit NDI-NM from disciplining the CP for violating NDI-NM policies or from terminating the CP for violating its policies. *Tr. 594:15-21*. The CP understood this. *Tr. 601:9-11*.

The CP's internal complaint or grievance was investigated by Maria Wolfe, NDI-NM's Director of Business and Administration. Ms. Wolfe found no discrimination against the CP. *Tr. 621:10-18.*

The CP's charge filed with the EEOC and HRB claimed NDI-NM placed on probation for being verbally abusive, but that she had "never been verbally abusive". *NDI-NM Exhibit VV.* The CP also claimed that NDI-NM took this action against her because of her national origin. *Id.* The HRB found there was no validity to the CP's allegations against NDI-NM. *Tr. 621:19-622:3.* The CP appealed the HRB's finding to the EEOC, and the EEOC also found there was no probable cause for the CP's complaint against NDI-NM. *Tr. 622:6-8.*

C. NDI-NM Acted Properly in Its Investigations into the Two Complaints Against the CP, Including When It Solicited her Response to the Complaints and When It Did Not Assign Her to its Fall Program Classes Because the Investigations Were Not Yet Complete.

1. The EA's Complaint Against the CP.

On or about May 14, 2015, NDI-NM received a complaint against the CP from the Educational Assistant (the "EA") of a visually impaired student (the "Impaired Student") at Gonzales Elementary School. *Tr. 299:18-22; Tr. 327:22-328:2.* The EA alleged that during NDI-NM's year-end event, the CP forcefully grabbed the Impaired Student by the arm hard enough for the Impaired Student to exclaim "Ow!" and also grabbed the EA hard enough to leave a bruise on the EA's arm. *NDI-NM Exhibit K.*

Ms. Salganek and Ms. Wolfe spoke directly to the EA. *Tr. 711:12-19; NDI-NM Exhibit L.* Initially, the EA did not know the name of the person who had grabbed her and the Student. However, she was able to describe the CP, and then later, after seeing the CP's name tag, identified the CP by name. *Tr. 326:2-10.* The EA told Ms. Salganek and Ms. Wolfe that the CP

had grabbed her by the arm so hard that it left a bruise and that the CP had handled the Student in a similarly rough manner. *Tr. 326:22-327:5; Tr. 712:8-23*. In an apparent attempt to show that NDI-NM did not correctly understand that the EA's complaint was against the CP, the CP suggests that the EA did not speak or understand English. *Tr. 499:4-10*. However, the EA spoke in English and did not indicate that she needed to communicate in another language. *Tr. 712:24-713:5*. Ms. Salganek and Ms. Wolfe saw the bruise on the EA's arm, *Tr. 300:11-12*. Mr. Baker had asked if there was a picture of the bruise, and Ms. Wolfe took a picture to document it. *Tr. 714:3-715:12; NDI-NM Exhibits J and K*.

Ms. Salganek informed the CP of the complaint brought by the EA against the CP. The CP responded as she had to prior criticisms of her, by denying as false any accusations and by saying, "That's bullshit. I never touched anyone." *Tr. 328:3-13; NDI-NM Exhibit I*. Notwithstanding the clear statements by the EA identifying the CP as the person who had grabbed and injured her, the CP's response was very forceful and defensive. *Tr. 328:23-329:7; Tr. 334:19-23*. Sometime later, the CP texted Ms. Salganek that the EA's complaint was about the way the CP had yelled, that the CP had apologized, and that the matter was resolved. *NDI-NM Exhibit XX*. The CP has never acknowledged forcefully grabbing the EA or the Impaired Student, *Tr. 300:8-10*, despite the overwhelming evidence, including a photograph of the bruise, that shows she did. *Tr. 480:21-22; Tr. 481:14-16; Tr. 489:7-11*. The CP's other attempt at a defense is her claim that she could not have hurt the EA as alleged because the CP herself was injured. *Tr. 577:21-578*. However, the CP did not tell Ms. Salganek of her injury when Ms. Salganek allegedly placed her in a position where she would help prevent injuries to performers coming off the stage. *Tr. 608:6-8*. The first time she raised this defense was in an email to Mr.

Baker more than a month after the incident. *GC Exhibit 14*.

A separate complaint regarding this incident was brought by the Gonzales In-School Coordinator during NDI-NM's May 19, 2015 wrap-up meeting with the school. *NDI-NM Exhibit M; Tr. 671:1-674:9*. At the wrap-up meeting, the Gonzales Principal and staff reiterated how the CP had grabbed the EA so hard that it left a bruise and confirmed that the EA had a visible bruise on her arm. *NDI-NM Exhibit M; Tr. 673:13-22*. The Principal told Alison Montoya, NDI-NM's Santa Fe Program Producer, they were very angry about the incident and that it must never happen again. *Tr. 672:3-7; NDI-NM Exhibit M*. What was most troublesome to the Principal was that when the CP apologized to the EA, she said, "I'm sorry, I thought you were a student." *Tr. 672:14-674:9; NDI-NM Exhibit M*. One of the teachers wondered if that was how the CP was regularly treating the children. *NDI-NM Exhibit M*. The Principal also raised concerns about liability on the part of the school and NDI-NM regarding the matter. *NDI-NM Exhibit M*.

2. Ms. Carpenter's Complaint Against the CP.

On June 18, 2015, Ms. Lowman sent an email to NDI-NM staff regarding the filthy condition of a kitchen sink in NDI-NM's cantina and asked all employees to do their part to keep it clean. *NDI-NM Exhibit II*. After Ms. Lowman sent the email, *Tr. 432:4-12*, the CP made inappropriate bullying and mocking comments about Ms. Lowman to Rachel Carpenter (NDI-NM's North Program Producer and the CP's co-worker), *Tr. 142:18-19*, and other employees throughout the day. *Tr. 305:3-18*. The CP said "that is all Emily has time to do is find problems with shit" and was cussing and belittling Ms. Lowman. *GC Exhibit 18*. The CP also said she was going to buy fake cockroaches and put them in the sink for Ms. Lowman to find, *id.*; and told someone else "I was thinking of sending a response that the crickets were mine". *NDI-NM*

Exhibit ZZ.

At the hearing, the CP admitted that she spoke to Ms. Carpenter, Ms. Foss, Ms. Briggs, and Jindra McIntosh about Ms. Lowman. *Tr. 504:1-12; Tr. 510:17-24.* The CP also admitted that she used the -“F” word when she texted Ms. McIntosh about Ms. Lowman, *Tr. 509:14-19*, (“*she needs to change a fucking diaper*”), and believes that she can use foul language at any time at NDI-NM. *Tr. 645:2-4.*

The first instance of the CP’s making such comments occurred in the hallway of the Dance Barns. *Tr. 681:17-20.* The second instance occurred when Ms. Carpenter and Ms. Briggs were setting up a board in a public setting. *Tr. 683:5-9.* At this time, the CP went up to Ms. Carpenter and Ms. Briggs and began cussing and using the “f word” while making her comments about Ms. Lowman, *Tr. 683:15-18*, even though there were children and parents nearby. *Tr. 683:19-22; Tr. 693:6-18.* The parents and the children were within arm’s reach of Ms. Carpenter and the CP. *Tr. 693:22-694:2.*

The third instance occurred when Ms. Briggs and Ms. Carpenter were setting up t-shirts. *Tr. 684:17-20.* The CP came up to Ms. Carpenter and Ms. Briggs and, again, began cussing when talking about Ms. Lowman. *Tr. 685:16-21.* Children were beginning to exit class and there were children, parents, and volunteers nearby. *Tr. 685:16-686:20; Tr. 694:7-17.* The children were within arm’s reach, *Tr. 694:18-20*, and the parents and volunteers were close to Mr. Carpenter’s hip or within her arm’s reach. *Tr. 694:11-14.* Ms. Carpenter was extremely uncomfortable because parents and children were looking at her. *Tr. 686:12-14; 695:3-13.* Ms. Carpenter was also uncomfortable because the CP was going to intentionally emotionally and mentally bully Ms. Lowman by purchasing cockroaches and placing them in the sink. *Tr.*

686:15-22; *Tr.* 695:14-18. The CP's bullying behavior really got to Ms. Carpenter. *Tr.* 689:24-690:3. The fourth instance occurred when the CP spoke inappropriately about Ms. Lowman in the Cantina. *Tr.* 688:6-13.

On June 19, 2015, Ms. Carpenter complained to Ms. Salganek about the CP's behavior. *Tr.* 689:18-20; *NDI-NM Exhibit JJ*. Ms. Carpenter understood the CP to be talking about Ms. Lowman personally by saying things like "Emily should get a life", and not about the email she had sent. *Tr.* 692:3-6. Ms. Carpenter believed that having overheard the CP's remarks, children would think negatively of NDI-NM and think of it as a "non-teamwork" company. *Tr.* 689:22-24. Ms. Carpenter thought the CP's comments about Ms. Lowman were inappropriate in the workplace and did not want to be associated with them. *Tr.* 361:12-21; *Tr.* 689:24-690:3. Ms. Carpenter had the prerogative to complain about the CP's behavior and to ask management to address it. *Tr.* 361:25-362:5.

i. Ms. Salganek's Review

Ms. Salganek informed the CP of Ms. Carpenter's complaint. *GC Exhibit 15*. Ms. Salganek told the CP that before deciding if the comments were inappropriate and insubordinate, she wanted to hear from the CP and suggested a meeting. *Id.* The CP responded by stating Ms. Salganek had violated the Settlement Agreement by threatening unspecified reprisals. *GC Exhibit 17*. The CP further stated that her comments about Ms. Lowman were "protected activity" and that Ms. Salganek did not know the scope of protected employee activity under the NLRA or the concept of insubordination. *Id.*

Ms. Salganek then contacted Ms. Carpenter to make sure she understood her allegations correctly and said she would be contacting the CP. *NDI-NM Exhibit JJ at 2*. Ms. Salganek also

spoke to Ms. Briggs to confirm Ms. Carpenter's account of the CP's comments, *NDI-NM Exhibit JJ at 2*. Ms. Briggs told Ms. Salganek that Ms. Lowman's email "seemed to be an excuse for [the CP] to insult or tease [Ms. Lowman]." *NDI-NM Exhibit JJ at 3; NDI-NM Exhibit KK*. Ms. Salganek also asked Ms. Carpenter to place the complaint in writing, which she did. *Tr. 309:7-15; Tr. 310:5-8; GC Exhibit 18*. Because of the nature of the comments, the CP's prior conduct and comments, and the CP's strained relationship with Ms. Lowman, Ms. Salganek concluded that the comments were not made for any protected activity. *Id.*

ii. The Nature of the CP's Comments

In the past, Ms. Salganek had heard that the CP would express her artistic differences and complaints about management with other NDI-NM employees, and had done nothing in response. *Tr. 363:3-364:5; see GC Exhibits 4, 38, 39, 40, 41 and NDI-NM Exhibits H, MM, QQ, RR, SSS and WW*. The comments that Ms. Carpenter described were different from the CP's prior comments about Ms. Lowman because they were personal attacks against Ms. Lowman with nothing motivating them other than sheer animosity and an attempt to demean and humiliate Ms. Lowman. *Tr. 364:9-15*. They were not a joke; they were insulting, mocking, and malicious. *Tr. 364:16-365:9*. Joking or mocking about a manager is not against NDI-NM policies unless it is personal and malicious. *Tr. 381:23-382:14*.

Ms. Salganek knows that an employee cannot be disciplined for simply complaining about their supervisor unless the language is particularly hostile or threatening. *Tr. 321:22-322-1*. Ms. Salganek did not believe the CP's comments were complaints about Ms. Lowman's management style, about the conditions of her work, or that she was engaging in any collective or protected activity. *Tr. 322:2-12*. Nor did she believe the CP's comments concerned artistic

differences. *Tr. 325:1-4*. The CP had raised artistic differences before, such as when she didn't like the choice Ms. Salganek had made about costumes and about narration. Ms. Salganek accepted the CP's comments and incorporated them. *Tr. 375:9-19*. NDI-NM would listen to those who had disagreements. *Tr. 394:20-23*.

iii. The CP's Strained Relationship with Ms. Lowman.

Ms. Salganek also knew that the working relationship between Ms. Lowman and the CP was strained. *Tr. 323:13-18*. In fact, their relationship had always been acrimonious and tense. For example, soon after Ms. Lowman had been promoted to a management position, the CP told Ms. Lowman that everyone hated Ms. Lowman and talked about her behind her back. *Tr. 383:5-14; Tr.415:13-21*. During a Santa Fe team meeting earlier in the year, while making changes to some choreography that would affect all teachers, Ms. Lowman made a self-deprecating joke and then said, "Please don't be mad. Don't make a voodoo doll out of me." Ms. Salganek heard the CP respond, under her breath, "There's already a voodoo doll of you." *Tr. 292:8-22*. Ms. Salganek told the CP the comment was disrespectful and inappropriate and that if she made such further remarks, they would be considered insubordinate. *Tr. 293:19-24; GC Exhibit 15*.

Ms. Salganek also knew that the CP had posted another "voodoo" comment on Facebook. *Tr. 342:7-20; Tr. 380:19-22; NDI-NM Exhibits GG ("Voo doo hoo doo, you're gonna be doo doo!") and HH ("Respect the Voodoo doll bitches!")*. The CP's comment and postings were insulting and denigrating comments directed at Ms. Lowman personally, and Ms. Salganek was concerned that NDI-NM students who were Facebook friends with the CP would see them. *Tr. 342:7-344:9*. Nonetheless, the CP was not disciplined for her "voodoo" comments. *Tr. 295:25-296:1*.

Ms. Lowman thought the CP was a good teacher who had creative ideas and creative choreography, connected well with children, and worked really hard, *Tr. 387:9-13*, but she also felt the CP was not easy to supervise. *Tr. 414:24-25*. This was especially true after January and February. *Tr. 437:24-438:3*. Nonetheless, Ms. Lowman always spoke to the CP in a direct and professional way. *Tr. 406:6-10*. Ms. Lowman would listen to the CP's ideas and her differences of opinion and take them into consideration, and if she could, would let the CP do what she liked. *Tr. 415:22-416:4*. Ms. Lowman did not take any disciplinary action against the CP for such differences, *Tr. 416:9-11*, but continued to attempt to improve their relationship. *Tr. 372:10-15; Exhibits QQ, RR, and SS*. The CP, however, refused to meet with Ms. Lowman without the CP's attorney present. *Tr. 372:23-373:10*. NDI-NM cannot run its business if its employees can bring an attorney to meetings anytime a supervisor requests to meet. *Tr. 373:22-374:4*.

iv. Ms. Salganek's Transfer of the Complaint to Mr. Baker

Like Ms. Carpenter, *Tr. 692:4-6*, Ms. Salganek believed comments were personal digs that were mocking, malicious, and hostile insults directed at the fact that Ms. Lowman does not have children. *Tr. 311:9-20*. Ms. Salganek also considered them to be insubordinate; *Tr. 312:11-14; Tr. 359:22-360:9*; however, Ms. Salganek did not take any disciplinary action against the CP. Instead, Ms. Salganek told the CP that she would discuss the matter and any possible disciplinary action with Mr. Baker. *Tr. 315:4-9; NDI-NM Exhibit U*. The CP responded by accusing others, including Ms. Lowman, of negative talk, and by stating that Ms. Salganek should be "aware of the principle that civility in the workplace is dead before the NLRB." *Id.*

Ms. Salganek did not undertake any further action into the matter, except to pass it on to

Mr. Baker. *Tr. 348:13-17*. Ms. Salganek did not recommend any disciplinary action be imposed on the CP, and she did not know what the outcome of Mr. Baker's investigation would be. *Tr. 348:25-349:14*.

3. Mr. Baker's Investigations

a. Into the EA's Complaint Against the CP.

i. The CP Refused Mr. Baker's Invitations to Meet.

Mr. Baker called the CP on her cell phone and left a message asking to meet with her about the complaint brought by the EA. *Tr. 98:24-99:2; NDI-NM Exhibit P*. The CP responded by email asking why he wanted to meet with her. *NDI-NM Exhibit P*. Mr. Baker, said he wanted to discuss the interaction between her and the EA and to hear from her in order to understand what had happened. *Tr. 94:22-95:2; NDI-NM Exhibit P*. The CP responded with a letter stating that she was surprised the matter was still an issue. *GC Exhibit 11*. The CP claimed that she had discussed the accusations against her with "both EAs" and had talked to the children, and was informed that "no such accusation was made." *GC Exhibit 11*. The CP also blamed Ms. Lowman "for failing to properly instruct and direct blind dancers and their aids" and Pamela Ladas for "lack of judgment in her placement of these students". *GC Exhibit 11*. The CP stated she would meet with Mr. Baker only under certain conditions, including being given detailed information about who accused her and what the allegations were and that her attorney be present. *GC Exhibit 11*.

Mr. Baker did not believe an attorney was needed. *Tr. 122:2-9*. Mr. Baker simply wanted to hear "her side of the story" and thought they would have a short meeting that would resolve

the matter. He had never met with an employee and their attorney before. *Tr. 123:7-14; NDI-NM Exhibit Q*. The CP responded with another letter stating that she required “full disclosure” of the basis for his concerns regarding the incident. *GC Exhibit 12*. Mr. Baker responded by first offering, again, to meet with the CP, *NDI-NM Exhibit R*, and then providing detailed information about the complaint and by again asking to meet with her regarding her response to the complaint. *GC Exhibit 12a*. After more than one week, Mr. Baker had not heard back from the CP and therefore wrote again to request a meeting. *NDI-NM Exhibit S*. The CP finally responded by stating that she was “awaiting an evaluation of this request from [her] attorneys prior to setting a meeting.” *NDI-NM Exhibit S*.

Later, the CP responded with another letter stating that Mr. Baker’s previous email was “‘Exhibit A’ of second and third hand allegations and innuendo and outright lies”. *GC Exhibit 13*. She “categorically den[ied] having touched, much less injured, [the EA], and/or any visually impaired student.” *GC Exhibit 13*. She also stated that she would meet with Mr. Baker when she was “in full possession of actual facts, not hearsay and innuendo”. *GC Exhibit 13*. Mr. Baker told the CP he had provided her the information he had concerning the complaint and wanted to meet with her to hear what she had to say about it. He explained that he would then gather more information and determine whether the complaint was valid and if any action needed to be taken. He also stated that if they were not able to meet, he would rely on her prior emails and letters as her response and continue to investigate the matter. *GC Exhibit 13a*.

The CP was encouraged to meet with Mr. Baker, but declined to do so. *Tr. 494:3-11*. Instead, the CP responded by stating that it was clear Mr. Baker did not have or was not willing to share the information she requested. *GC Exhibit 14*. She also described, from her point of

view, the prior correspondence between them. She accused him of acting “in bad faith”, and, for the first time, she claimed that she could not have grabbed anyone because she was “physically unable to grab anyone or anything” because of a prior injury. She stated that he must close the matter or she would file another complaint with the NLRB and the EEOC. *GC Exhibit 14*. Mr. Baker was disappointed at the CP’s refusal to meet with him and advised the CP he would consider her prior emails and letters as her response to the complaint and would continue with his investigation. *Tr. 138:14-17; NDI-NM Exhibit T*. The CP replied by denying she had refused to meet with Mr. Baker and blaming him for the fact that they had not met. *GC Exhibit 16*.

ii. Mr. Baker’s Investigation and Conclusion

Mr. Baker proceeded with his investigation, interviewing a total of seven people and considering her responses. *Tr. 98:19-21; Tr. 120:19-24; Tr. 121:3-8; NDI-NM Exhibit A*. He prepared a report describing his discussions with each of the individuals interviewed and summarizing the CP’s communications. *NDI-NM Exhibit A*. Mr. Baker was concerned about the disparity between the EA’s and the CP’s stories. He noted that in all the interviews, especially the one with the EA, the details were consistent and appeared to be honest. He also found it hard to believe that the EA would make up such a story and tell so many people “with the only hope that it ‘doesn’t happen again’”. *Id.* He also noted that the EA “stated clearly that [the CP] came and apologized for grabbing her” yet the CP denied to him and others that she had ever touched the EA. *Id.* Mr. Baker concluded that the CP was not being forthcoming and wondered if she could take direction and personal accountability. *Id.*

Mr. Baker determined that the investigation should be considered in conjunction with the CP’s probationary status and expectations established at the beginning of the year and Ms.

Carpenter's complaint against the CP to determine appropriate action. *NDI-NM Exhibit A*. He also stated his belief that the CP had acted disrespectfully, unprofessionally, and inappropriately toward the EA and Impaired Student, that her behavior violated the terms of her probation, and that with the multiple complaints against her, it did not appear she could act professionally in the workplace and represent NDI-NM. He noted her refusal to accept constructive criticism or to take responsibility for her conduct. He therefore recommended that her employment be terminated. *Id.*

b. Into Ms. Carpenter's Complaint

Mr. Baker also undertook an investigation into Ms. Carpenter's complaint. He began by telling the CP he had read her response to Ms. Salganek and invited the CP to provide any additional response, if she wished. *Tr. 140:18-141:1; GC Exhibit 21*. The CP responded by "absolutely deny[ing] that [she] 'cussed' or used the word 'shit' and 'shitty' or made 'use of such language in front of children and parents'". *GC Exhibit 22*. The CP went on to state that other NDI-NM employees and others had used such language but had never been disciplined. *Id.* The CP also complained that Mr. Baker had given her only 48 hours to respond. Mr. Baker replied by explaining that he was attempting to finish his investigation into the complaint and needed her response as soon as possible *GC Exhibit 23*. Mr. Baker also explained that classes were scheduled to begin the following week and class assignments could not be made until the investigation was complete. *Id.* He also asked the CP to provide him with names of witnesses she thought he should interview and said he would look into her allegations of other employee's use of profanity. *Id.* Although Ms. Carpenter's complaint was that the CP was bullying and demeaning Ms. Lowman, *Tr. 149:21-23*, Mr. Baker focused on the allegations that the CP had

used profanity and foul language, including the “f” word, in front of children and parents or family members that were picking them up. *Tr. 147:21-24; Tr. 148:9-19; Tr. 149:3-7; Tr. 182:5-19*. The CP responded to Mr. Baker with the following threat: “All details, including name of offenders, of the above scenario will be made public should you persist in this claim and it becomes necessary to litigate it in federal court.” *NDI-NM Exhibit 25 at 3*.

As part of his investigation, Mr. Baker spoke to Ms. Carpenter, Hannah Foss (NDI-NM’s Residency Director), *Tr. 141:15-22; Tr. 142:5-10*, and Melissa Briggs (an NDI-NM full-time teacher), *Tr. 34:21-22; Tr. 149:8-11*. By the time he was completing and writing up his investigation into this second complaint against the CP, Mr. Baker began to see a pattern in the CP’s behavior and conduct. *Tr. 192:5-9*. Additionally, Ms. Lowman informed Mr. Baker that she did not believe the CP had met the expectations of her probation. *Tr. 252:14-253:1; NDI-NM Exhibit AA*. Ms. Lowman told Mr. Baker that she was uncomfortable with the probation as the CP had never signed the probation letter, that there were a number of meetings that she missed or arrived at late, that it was an uncomfortable and difficult working relationship, and that Ms. Lowman had to work very hard to give the CP information needed for their program. *Tr. 433:22-434:19*. Ms. Lowman, however, did not make any recommendations to Mr. Baker about what, if any, actions to take. *Tr. 434:22-435:1*.

Mr. Baker concluded that the CP’s employment should be terminated, *Tr. 192:10-24*, and as the final decision maker, he decided to do so on September 3, 2015. *Tr. 193:3-12*. The CP’s refusal to accept responsibility for her conduct is demonstrated by her claim that she still does not know what it was she had done at Sweeney to be placed on probation. *Tr. 453:20-21*. This claim is inconsistent with her denial that she ever verbally abused a principal or anyone else, *Tr.*

543:19-22, and her acknowledgement that Ms. Lowman told her she was being placed on probation for having verbally abused the principal and teachers at the school. *Tr. 545:14-17.*

4. The CP Could Not be Assigned to Classes in NDI-NM's Fall Schedule Until the Investigations Were Complete.

Mr. Baker's investigations occurred during the summer, *Tr. 154:6-17*, when many of the witnesses were on vacation or otherwise unavailable. *Tr. 496:22-497:6; NDI-NM Exhibit A at 1.* Accordingly, the investigations were not yet complete when the time came for NDI-NM to assign teachers to the fall program classes. *NDI-NM Exhibit W.* NDI-NM did not know whether the CP would be disciplined or whether she would lose additional classes as stated in her probationary letter. Accordingly, NDI-NM could not assign the CP to any Fall classes prior to completion of Mr. Baker's investigations. *NDI-NM Exhibits W; X, Z, and AA.* NDI-NM had not yet decided what, if any, action to take regarding the complaints against the CP, and therefore, , the CP was still a member of the NDI-NM Staff. *NDI-NM Exhibit AAA.*

NDI-NM did not attempt to assign anyone instead of the CP to the Fall Program. *Tr. 349:15-351:3; NDI-NM Exhibit LL* (NDI-NM was not looking to replace the CP but was only seeking "coverage for next week" and asking others about "availability to sub these classes").

D. NDI-NM Acted Properly in Terminating the CP's Employment.

Mr. Baker's investigations showed that the CP had violated the terms of her probation by:

- 1) acting improperly and in violation of NDI-NM's Core Values and its Employee Conduct and Office and Personal Etiquette policies;
- 2) acting disrespectfully, unprofessionally, and inappropriately toward members of the NDI-NM community, including the children it serves;
- 3) refusing to accept constructive criticism directed toward improvement of her performance; and
- 4) refusing to take responsibility for her behavior. *Tr. 174:5-18.* Mr. Baker determined that the

CP's employment should be terminated. On September 4, 2015, Mr. Baker sent the CP a letter stating that her employment with NDI-NM was being terminated effective immediately. *GC Exhibit 27; Tr. 157:18-22; Tr. 262:17-23*. These were each violations of the CP's probation and each individually provided grounds for termination. *Tr. 365:25-366:14*. These were the only reasons NDI-NM terminated the CP's employment. *Tr. 157:20-22*.

Specifically, the CP violated the value of excellence, which refers to the highest quality teaching techniques and methodology in working with students and applies to the way that NDI-NM works as an organization inside and outside of the classroom and with the way its members treat one another, *Tr. 158:1-5*, by grabbing the EA and student and by swearing in front of children and their families. *Tr. 158:8-16; Tr. 161:3-11; Tr. 162:1-6; Tr. 174:5-18; Tr. 177:1-6*. The CP violated the Employee Conduct Policy and the Expectations of Employee Conduct Policy by inappropriately touching and hurting the EA and the Impaired Student, and by using profanity and foul language in front of students and parents. *Tr. 177:16-25*. The CP's behavior was not positive, respectful or professional, and it showed the CP's failure to use good judgment with respect to her communications. *Tr. 173:23-174:11; Tr. 174:5-11; Tr. 178:5-10; Tr. 261:19-262:8*.

The CP also violated these policies by not being personally accountable for her conduct, failing to take responsibility for her actions, and by not telling the truth. *Tr. 174:12-18*. As a further example of the CP's refusal to accept criticism and responsibility for her conduct, as of the date of her termination, the CP claims she didn't know what Mr. Baker was stating she had done with respect to the Gonzales incident. *Tr. 532:12-533:5*.

Although not a reason for her termination, the CP's conduct with regard to the EA and

Impaired Student, as well as her use of profanity around students and parents, also violated NDI-NM's Expectations of Employee Conduct policy that went into effect on September 3, 2015. *Tr. 180:6-19.*

E. A Complaint Against Another NDI-NM Employee Was Substantially Different From the One Against the CP.

During the Gonzales wrap-up meeting, the Gonzales Principal and his staff brought up a separate incident that occurred during the end-of-year event involving another NDI-NM teacher. However, NDI-NM was aware of this second incident, *Tr. 107:18-108:12*, because the NDI-NM teacher, Gemtria St. Clair, had already reported to Ms. Lowman that she thought she had disturbed the Gonzales teacher when she moved her. *Tr. 108:24-109:18; Tr. 251:7; Tr. 333:6-14; Tr. 333:19-334:7; Tr. 408:4-11.* While the Gonzales Principal was concerned about this incident, it did not upset him as much as the incident involving the CP and the EA and Impaired Student. Ms. St. Clair had not left marks on the teacher, had apologized profusely, tried to make it up to her, and had smoothed things over with her. *Tr. 675:9-16.*

And, unlike the CP, Ms. St. Clair provided Mr. Baker information regarding the complaint against her. *Tr. 126:14-16.* Also unlike the CP, Ms. St. Clair was very apologetic and stated that she understood that physically moving people is not the best way to interact with them. *Tr. 187:3-12; Tr. 408:18-24.* Like the CP, NDI-NM did not assign Ms. St. Clair to teach any classes for the fall program pending completion of Mr. Baker's investigation into the complaint against her. *Tr. 189:7-9; Tr. 247:8-18; NDI-NM Exhibit W.* After his investigation was complete, Mr. Baker issued Ms. St. Clair a disciplinary letter summarizing his discussion with her that rough handling of a teacher or another person was unacceptable. *Tr. 188:13-24. NDI-NM Exhibit Y.*

Mr. Baker did not terminate Ms. St. Clair's employment because she was not on probation and did not have the a history of improper behavior. *Tr. 249:23-250:5*. Additionally, Ms. St. Clair was proactive with respect to the complaint against her insofar as she recognized the moment she had done something to offend someone, apologized to that person immediately, and tried to remedy the matter. *Tr. 250:7-11; Tr. 251:7-14*. Ms. St. Clair also provided suggestions on how to improve her and others' actions and behavior backstage. *Tr. 250:15-22*. Thus, Ms. St. Clair's reaction to the complaint was consistent with NDI-NM's values and beliefs. *Tr. 250:11-14*.

F. NDI-NM's Employee Conduct Policy is Not Overly Broad or Discriminatory.

In accordance with the March 13, 2015 Settlement Agreement, NDI-NM changed the name of its Standards of Professional Conduct Policy, *NDI-NM Exhibit HHH*, and revised it to state as follows:

Employee Conduct

NDI New Mexico requires all employees to adhere to the highest standards of conduct in their appearance, behavior, language and mannerisms when representing NDI New Mexico, whether on or off NDI New Mexico premises. Please keep in mind that as a representative of NDI New Mexico, you are inherently a role model for the children and families we serve.

NDI-NM Exhibit F. NDI-NM notified its employees of the revisions by email dated March 13, 2015. *Tr. 86:6-12; Tr.87:10-16;NDI-NM Exhibit F*.

Subsequently, during a telephone conference regarding the CP's March NLRB Complaint, NDI-NM informed the NLRB of its intent to review and update all of its policies, including the newly revised Employee Conduct policy. The Administrative Law Judge advised NDI-NM General Counsel's Report to assist NDI-NM with its revisions. NDI-NM relied on that Report to revise its employment manual. *Tr. 263:8-25; Tr. 709:21-710:6*. In particular, the

General Counsel's Report states that the following language has been found to be lawful:

"Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.

NDI-NM Exhibit GGG at 10.

NDI-NM used this language to create its Expectations for Employee Conduct policy, which was issued with the revised Employee Handbook on September 3, 2015. *Tr. 708:25-709:17.* NDI-NM's Expectations for Employee Conduct policy states:

Being insubordinate, threatening, intimidating or disrespectful to managers, supervisors, co-workers, or any other individual in the course of conducting business will result in discipline, up to and including termination.

GC Exhibit 37 at 11. NDI-NM did not include the word "assault" in its policy. *Tr. 263:19-22.* However, NDI-NM did include the following language to ensure employees knew and understood that nothing in the revised Employee Conduct Policy or in any other policy of the Handbook was intended to or should be construed as limiting any of their rights under the NLRA:

Note that all employees have rights under the NLRA to engage in protected concerted activities including discussing your terms and conditions of employment, wages or benefits or work conditions. Nothing in this policy is meant to, nor should it be interpreted to, in any way limit your rights under any applicable federal, state, or local laws, including your rights under Section 7 of the National Labor Relations Act, including but not limited to the right to engage in protected concerted activities with other employees for the purposes of their mutual aid and/or protection, or to improve terms and conditions of employment, such as wages and benefits.

GC Exhibit 37 at 11; Tr. 264:4-24. NDI-NM also included similar language in other sections of its Handbook. *See e.g., GC Exhibit 37 at 10 and at 12.*

NDI-NM's Expectations for Employee Conduct is consistent with the General Counsel's Report, is not overly-broad or discriminatory, and does not violate the NLRA or the Settlement

Agreement.

G. NDI-NM Did Not Threaten Employees with Unspecified Reprisals for Violating Policy.

As set forth above, Ms. Salganek contacted the CP by e-mail to advise the CP of the complaint lodged by Ms. Carpenter. The CP responded by denying any wrongdoing and stating that others were lying. Ms. Salganek asked Ms. Carpenter to place her complaint in writing, which she did. Ms. Salganek also contacted Ms. Briggs and Ms. Foss, two other NDI-NM teachers whom Ms. Carpenter stated were present when the CP was speaking about Ms. Lowman in a derogatory manner and using foul language within earshot of students and parents.

Ms. Salganek then informed the CP of her belief that the CP's conduct and comments about Ms. Lowman were not made for the purposes of mutual aid and protection and to discuss working conditions, but rather were motivated by "personal animosity toward [Ms. Lowman]". Ms. Salganek also informed the CP that she considered the CP's conduct to be insubordination, but that she was referring the matter to Mr. Baker. Ms. Salganek's July 31, 2015 email, *NDI-NM Exhibit U*, did not threaten the CP with unspecified reprisals. Ms. Salganek simply advised the CP that if her conduct was determined to be insubordinate and in violation of NDI-NM policies, the CP would be subject to discipline. *Tr.358:5-15*.

III. LEGAL ARGUMENT

A. NDI-NM's Expectations for Employee Conduct Policy

The General Counsel has the burden to prove that a rule or policy violates the act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. According to the test set out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), a rule is

unlawful if it explicitly restricts Section 7 rights. If it does not, then it is deemed to be a violation of Section 8(a)(a) only “upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* At 647. A rule is not unlawful simply because an employee could read it as barring Section 7 activity. The relevant question is would a reasonable employee read the rule as prohibiting Section 7 activity. *Id.* The NLRB must give the rule a reasonable reading, and while ambiguities are construed against the employer promulgating the rule, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Weyerhaeuser Company and Association of Western Pulp and Paper Workers*, 2012 WL 272283 (2012), the NLRB must “refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.” *Lutheran Heritage*, 343 NLRB at 646.

NDI-NM’s Expectations for Employee Conduct policy does not explicitly restrict Section 7 rights and is clearly lawful. In order to allege it is not, the General Counsel improperly reads one sentence of the policy in isolation. That is, the Complaint alleges that the following sentence is overly-broad and discriminatory: “Being insubordinate, threatening, intimidating or disrespectful to managers, supervisors, coworkers, or any other individual in the course of conducting business will result in discipline, up to and including termination.” *Complaint at 3, ¶4(c)*. The General Counsel ignores the fact that NDI-NM’s policy includes specific and clear language that its employees have rights under the NLRA and that *nothing* in the policy is meant to or should be interpreted to limit those rights. *See Section II.F., supra and GC Exhibit 37 at 10.*

Additionally, as previously stated, the language the General Counsel claims to be

unlawful is similar to language which the General Counsel has found to be lawful in the General Counsel's Report. *Compare language in GC Exhibit 37 at 10 with that in NDI-NM Exhibit GGG at 10.* NDI-NM reasonably and in good faith relied on the General Counsel's Report and "lawful" employee conduct language to develop its own conduct policy.

Even if it were necessary to engage in the *Lutheran Heritage* inquiry, the policy would still be deemed lawful. A reasonable NDI-NM employee would not construe the language at issue as prohibiting Section 7 activity. Instead, such an employee would construe it as consistent with NDI-NM's core values, beliefs, and mission. Additionally, the policy was not promulgated in response to any union activity, but rather was part of an update and revision of NDI-NM's Employee Manual. *Tr. 263:8-25; Tr. 709:21-710:6.* Also, the policy has not been applied to restrict the exercise of Section 7 rights. No action was taken against the CP pursuant to the policy. NDI-NM's actions toward the CP were taken because she violated the Employee Conduct policy, which was promulgated pursuant to the NLRB Settlement Agreement, the Office and Personal Etiquette policy, and NDI-NM's mission and core values, which as stated, have not been challenged here. *GC Exhibit 27; Tr. 20-22.*

B. NDI-NM's Termination of the CP's Employment was Lawful.

Under *Wright Line v. Lamoureux*, 251 N.L.R.B. 1083, 1089 (1980)², the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in NDI-NM's decisions to not assign the CP to the fall program and to terminate her employment. If the General Counsel were able to meet its burden, then the burden

² In *Champion Parts Rebuilders, Inc. v. NLRB*, 1983 WL 207889, at **3-5 (3rd Cir. 1983), the Court adopted the heavy burden of proof on the General Counsel by stating that "the ultimate burden of proof does not shift from the General Counsel and does not dissolve upon the employer at any stage."

would shift to NDI-NM to show that it would have taken the action regardless of the CP's protected activity. *Carleton College v. NLRB*, 230 F.3d 1075, 1078 (8th Cir. 2000). In the present case, the General Counsel has failed to show that the CP engaged in protected conduct or that it was a motivating factor in NDI-NM's decision.

The only evidence of protected activity by the CP was her filing of a charge with the NLRB in September 2014. The CP's inappropriate handling and injury of the EA and the Impaired Student cannot be viewed as protected activity. Nor can her use of foul language around students and parents be viewed as protected activity given the environment in which she used the profanity, including the "f" word, or the context in which she used it. Like Carleton College, it is essential that NDI-NM employees show each other mutual respect and civility as part of its mission and purpose. *Carleton College*, 230 F.3d at 1081. The CP failed to do this when she decided to use profanity to berate, harass and belittle Ms. Lowman. See *Medina General Operations v. NLRB*, 394 F. 3d 207, 212 (2005) (*derogatory attacks merely a manifestation of personal sentiments toward supervisor not a protected activity*). The CP was not attempting to improve terms and conditions of work. See *New River Industries v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991) (the term "concerted activity" embraces activities of employees who join together to achieve common goals). Rather, the CP was using Ms. Lowman's email as a vehicle to further her personal dislike and animosity toward Ms. Lowman. See *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 751-53 (4th Cir. 1949) (circulating petition that called for resignation of foreman who imposed discipline not protected).

Even if the CP had engaged in protected activity, which she did not, the General Counsel failed to show that such activity was a motivating factor in NDI-NM's decisions to not place her

on the Fall program and to terminate her. Assuming, for purposes of argument *only*, that the General Counsel had met its burden, the evidence shows that NDI-NM terminated the CP for proper and lawful reasons and not because she engaged in any protected activity.

The CP was on probation and knew she was on probation. The disciplinary letter approved as part of the NLRB Settlement explicitly stated that she could be terminated for violating any NDI-NM policies. Aware of this express warning, the CP violated the Employee Conduct policy (that had been approved as part of the NLRB Settlement) by forcefully grabbing and harming the EA and the Impaired Student. There can be no dispute that the CP's conduct in this regard was a clear violation of the Employee Conduct Policy. It was also a violation of NDI-NM's Office and Personal Etiquette policy, its core values, and its mission, none of which have been alleged to violate the NLRA.

Moreover, the CP's refusal to accept criticism directed toward improving her work performance and her refusal to accept responsibility ran afoul of NDI-NM's Office and Personal Etiquette policy, its core values, and its mission. For the CP to claim not to recall written documentation of her improper behavior and to continue to not understand why she was even placed on probation, demonstrates her inability or refusal to commit to act in a professional manner as required of NDI-NM employees who are expected to be role models for children and to teach respect, civility, excellence, and responsibility. *See Carleton College*, 230 F.3d at 1078. The CP's misconduct rendered her unfit for employment with NDI-NM.

NDI-NM showed through the evidence that other employees have been terminated for using foul language, *Tr. 699;11-15*, *Tr. 702:16-21*, and for lying, *Tr. 701:21-702:8*.

Finally, NDI-NM's evidence also demonstrated that the only reason it did not assign the

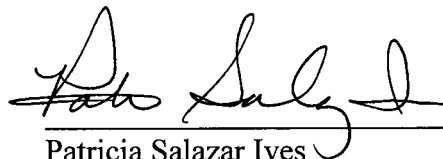
CP to the Fall program schedule was because the investigations into the complaints against her had not yet been completed. Therefore, NDI-NM could not and did not know what, if any, action it would take vis-a-vis the CP. For the same reason, NDI-NM also refrained from assigning to the Fall program scheduled the other employee, Ms. St. Clair, who had a complaint against her pending. *See Section II.E., supra.*

IV. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety.

Dated January 8, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Pat Salazar Ives", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing “*Respondent’s Post-Hearing Brief to the Administrative Law judge* ” was served via electronic mail, to the following on this 8th day of January, 2016:

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